

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

Received

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Copyright Royalty Bd.

Docket No. 16-CRB-0001-SR/PSSR

(2018-2022)

In re

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and "Preexisting"
Subscription Services (SDARS III)

**PARTICIPANTS' JOINT MOTION TO MODIFY
THE JUDGES' CASE SCHEDULING ORDER**

Pursuant to 37 C.F.R. § 351.5(a), the participants to this proceeding jointly move the Copyright Royalty Judges ("Judges") to modify the schedule established by the Judges in their *Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order* (March 14, 2016) ("Case Scheduling Order").¹

Appendix A to this motion compares the dates established in the Judges' Case Scheduling Order (left-hand column) and the revised dates requested by the participants (right-hand column). Although the participants are submitting this motion jointly, they disagree on certain issues. Those disagreements are set forth briefly below so that the Judges can assess the participants' competing positions.

¹ All participants join this motion except for David Powell and Music Reports, Inc. On Thursday, June 16, 2016, counsel for Sirius XM sent a copy of this Motion to Bill Colitre (for Music Reports, Inc.) and Mr. Powell indicating that the Movants intended to file this Motion on Friday, June 17, 2016, and asking for Messrs. Colitre and Powell to notify counsel for Movants whether each would like to join the Motion and whether each takes a position on the disputes discussed in the Motion. As of the date of filing, Messrs. Colitre and Powell have not indicated their position on this Motion.

Filing of Written Direct Statements. The Case Scheduling Order directs the participants to file their written direct statements on Friday, October 7, 2016. As this date falls between the Jewish holidays of Rosh Hashana (Oct. 3-4) and Yom Kippur (Oct. 12), and various attorneys for the participants will be out of the office for several days in observance of those holidays, the participants request an adjournment of this deadline to Wednesday, October 19, 2016, to provide sufficient time after Yom Kippur to finalize and file their Written Direct Statements.

Discovery Period.

Appendix A, attached, proposes revised dates for the Discovery Period commensurate with the filing of Written Direct Statements on October 19.

As in *Webcasting IV*, it provides a short period of time between that October 19 filing date and the commencement of discovery (October 21) so that the parties have time to review the other Written Direct Statements (which are typically voluminous) before formulating their document requests and interrogatories. This adjustment is consistent with the statute, which contemplates the passage of at least some time between the filing of written direct statements and the commencement of discovery. *See* 17 U.S.C. § 803(b)(6)(C)(ii)(I). It also will still allow completion of the discovery period prior to Christmas.

In addition, the participants propose setting dates certain for the exchange of and responses/objections to discovery requests. In the participants' experience, discovery proceeds in a more efficient and orderly fashion when there are set due dates for such exchanges. The participants propose to exchange documents relied on by their witnesses in preparation of written direct testimony on October 21, 2016; to exchange document requests and interrogatories on October 24, 2016; to exchange written responses and objections to document requests by

November 14, 2016; and to produce documents and interrogatory responses by November 22, 2016.

Filing of Written Rebuttal Statements. The participants propose moving the date for filing written rebuttal statements from January 27 to February 17, 2017. This proposed change follows from the proposal to shift to discovery period to end on December 21, 2016, and seeks to provide for sufficient time to prepare rebuttal statements after the year-end holiday period. In *Webcasting IV*, the Judges set a similar schedule, with discovery ending on December 29, 2014 and written rebuttal statements filed on February 23, 2015.

Hearing. The current Case Scheduling Order sets the hearing in this proceeding to begin on February 27, 2017. The participants are in agreement that this date should change, but have not agreed on the proposed new date.

SoundExchange, Music Choice and George Johnson Position:

SoundExchange, Music Choice, and Mr. Johnson propose that the hearing should commence on May 1, 2017. This change in the hearing date will avoid a conflict with the hearing in the *Phonorecords III* proceeding, which the Judges have scheduled to begin on March 6, 2017 (one week after the date currently scheduled for the *SDARS III* hearing). See Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords*, Docket No. 16-CRB-003-PR (2018-2022). The participants in the instant proceeding believe it is highly unlikely that the *SDARS III* hearing can be completed during the one week before the scheduled date of the *Phonorecords III* hearing. While it is difficult to predict the amount of time that will be needed for the hearing, experience in prior proceedings suggests that the hearing will require several weeks of the Judges' time.

By way of comparison, the Judges adopted a very similar hearing date in *Webcasting IV*. That hearing began on April 27. Because the *SDARS III* proceeding involves fewer parties than the *Web IV* proceeding, it is likely that the *SDARS III* hearing will require fewer trial days. Moving the hearing date to May 2017 would also make it easier to schedule witnesses' testimony, as witnesses may be traveling on Spring vacations in late March and April 2017. (In 2017, Easter will be on April 16, and Passover will be April 10 – 18).

In addition, a May 1, 2017 start date for the hearing will provide the participants with sufficient time for rebuttal discovery, if the Judges authorize it. The Case Scheduling Order states that the Judges may permit discovery after the filing of written rebuttal statements participants, but only on a motion of a participant. SoundExchange, Music Choice, and Mr. Johnson believe it is likely the participants will file a motion at the appropriate time seeking leave to take rebuttal discovery. It is not uncommon at the rebuttal stage for a participant to submit testimony that was not the subject of discovery in the direct case phase, including from witnesses who did not submit written direct statements. In fact, participants typically reserve some portion of their allotment of ten depositions for the rebuttal phase. It would be difficult to complete rebuttal discovery in the one month between the filing of written rebuttal statements and the hearing date set forth in the Case Scheduling Order. In comparison, in *Webcasting IV*, the Judges allowed for approximately two months (February 23 – April 27) between the submission of written rebuttal statements and the commencement of the hearing. A similar period here would enable the participants to engage in meaningful rebuttal discovery if the Judges allow it.

Finally, the May 1 start date proposed by SoundExchange, Music Choice, and Mr. Johnson would provide the Judges with at least five months between the submission of findings and conclusions and the issuance of their Determination.

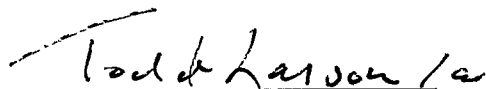
Sirius XM and Muzak Position:

Sirius XM and Muzak agree that the hearing should be moved from its current February 27, 2017 start date in order to avoid conflict with the *Phonorecords III* hearing, and to provide a sufficient window of time for rebuttal case discovery. While Sirius XM and Muzak do not oppose the May 1 start proposed by SoundExchange Music Choice, and Mr. Johnson, Sirius XM and Muzak will be prepared to begin the hearing after the conclusion of the *Phonorecords III* hearing and any interim period the Judges deem appropriate.

Proposed Findings and Conclusions. In order to ensure that the Judges have sufficient time to prepare and issue their Determination, SoundExchange, Music Choice, and Mr. Johnson propose that findings of fact and conclusions of law should be submitted no later than July 14, 2017, with reply findings and conclusions submitted two weeks later. As a point of comparison, the parties in the *Web IV* proceeding submitted findings and conclusions on June 19 and reply findings and conclusions on July 10. With fewer participants in the *SDARS III* proceeding, SoundExchange, Music Choice, and Mr. Johnson expect that the Judges will have fewer competing proposed findings and conclusions to review. Sirius XM and Muzak propose that findings of fact and conclusions law be submitted three weeks after the conclusion of the final hearing date as set by the Judges, with reply findings and conclusions submitted two weeks later.

Dated: June 17, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Todd Larson / a".

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Appendix A

Case Event	CRB Case Scheduling Order	Participants' Proposal
Commencement of Voluntary Negotiation Period	March 14, 2016	No change
End of Voluntary Negotiation Period	June 14, 2016	No change
Parties Notice of Settlement	June 17, 2016	No change
IF THE PARTIES DO NOT SETTLE or if the Judges decline to adopt the settlement		
Order for Further Proceedings	June 20, 2016	No change
Begin Preliminary Disclosure and Discovery	June 20, 2016	No change
End Preliminary Disclosure and Discovery	August 22, 2016	No change
File Written Direct Statements	October 7, 2016	October 19, 2016
Commencement of Discovery Period	October 7, 2016	October 21, 2016
Exchange Documents That Witnesses Relied on in Preparing Their Written Direct Testimony		October 21, 2016
Exchange Document Requests and Interrogatories		October 24, 2016
Exchange Written Objections/Responses to Document Requests		November 14, 2016
Produce Documents and Interrogatory responses		November 22, 2016
End of Discovery Period	December 6, 2016	December 21, 2016
End Settlement Conference Period	December 28, 2016	January 11, 2017
Deadline for Joint Settlement Conference Report	January 6, 2017	January 18, 2017

File Written Rebuttal Statements	January 27, 2017	February 17, 2017
Hearing	February 27, 2017	May 1, 2017 ²
File Proposed Findings and Conclusions	TBD	TBD, but not later than July 14, 2017
File Reply Findings and Conclusions		TBD, two weeks after the submission of proposed findings and conclusions
Issuance of Determination	Not later than December 15, 2017	No change

² Hearing and post-trial filing dates represent SoundExchange, Music Choice, and Mr. Johnson's proposal.

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I caused a copy of the foregoing public version of Participants' Joint Motion to Modify the Judge's Case Scheduling Order to be served by email and first-class mail to the participants listed below:

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Todd Larson